Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

COMPUWARE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Administrative Law Judge, the National Labor Relations Board and the Sixth Circuit erred in finding that the charging party had engaged in concerted activity, when the record utterly fails to show that any other employee had authorized the charging party to act on his or her behalf.

2. Whether the Administrative Law Judge, the National Labor Relations Board and the Sixth Circuit erred in the conclusion that the employer's client, Peat Marwick, was absolutely precluded from promulgating a work rule which prohibited employee communications of work-related concerns to Peat Marwick's client and, for that reason, in failing to balance the legitimate interests protected by the work rule against any incidental effect on employee rights under the Act.

3. Whether the Administrative Law Judge, the National Labor Relations Board, and the Sixth Circuit erred in failing to address the issue of employer knowledge of the asserted concerted nature of the charging party's activity as an element required to be proven by the Board.

PARTIES TO THE PROCEEDING

Petitioner/cross-respondent
Compuware Corporation[1]

Respondent/cross-petitioner
National Labor Relations Board

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[1] Compuware Corporation has no parent company or subsidiaries to list pursuant to Rule 29.6.

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The opinion of the United States Court of Appeals for the Sixth Circuit was filed on January 28, 1998. It is reported at 134 F.3d 1285 (C.A. 6 1998) and a copy is set forth in the within appendix. (App. D; pp. A45-A59)[2]. A decision was issued by Administrative Law Judge James L. Rose on September 7, 1995. A copy is set forth in the within appendix (App. A; pp. A1-A20). On December 18, 1995, the National Labor Relations Board issued its Decision and Order in this matter. A copy is set forth in the within Appendix (App. B; pp. A21-A40).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 28, 1998. The Sixth Circuit had appellate jurisdiction pursuant to 29 U.S.C. §160(f) and Federal Rule of Appellate Procedure 15(a). The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 13, 1998.

The Petition for Writ of Certiorari is being filed within 90 days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

In 1993, the State of Michigan contracted with KPMG Peat Marwick (hereinafter "Peat Marwick") to implement a new computer system called the Michigan Administrative Information Network, commonly referred to as M.A.I.N. (Tr., p. 128; Apx., p. 222). The Respondent, Compuware Corporation, was contracted by Peat Marwick to provide computer training personnel for Project

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[2] Citations to "App." are to the appendix filed with this petition for writ of certiorari pursuant to Supreme Court Rule 14(i). Citations to "Apx." are to the joint appendix filed in the Sixth Circuit in this case.

M.A.I.N., by which the Compuware trainers would teach M.A.I.N. systems application to State employees. (Tr., pp. 127-128; Apx., pp. 221-222)

At the commencement of the project, Peat Marwick instituted a work rule, applicable to all Compuware employees, which precluded Compuware employees from directly approaching Peat Marwick's client, the State of Michigan, about any work-related concern unless Peat Marwick specifically gave permission.[3] (Tr., pp. 142-143; Apx., pp. 236-237) All Compuware employees were informed of this work rule during their orientation at the commencement of their employment. (Tr., pp. 322-323; Apx., pp. 356-357) J. Michael Mutter, the Peat Marwick executive in charge of the training portion of Project M.A.I.N., testified that the reason for the work rule was to preserve the relationship between Peat Marwick and the State of Michigan, to avoid embarrassment and to maintain an orderly chain of command and system for addressing any issues that might arise relating to contract employees. (Tr., p. 146; Apx., p. 240)

In addition to instituting the rule precluding Compuware employees from approaching the State of Michigan, Peat Marwick also reserved the right, by contract, to approve hiring of Compuware employees and to require removal of Compuware employees from Project M.A.I.N. (Tr., pp. 128, 130; Apx., p. 222, 224) If Peat Marwick requested a Compuware employee be removed from Project M.A.I.N., Compuware was contractually required to do so. (Tr., pp. 128, 130; Apx., pp. 222, 224) Depending on the circumstances, such as employment status, marketable skills and the nature, frequency and severity of the problem or offense, Compuware might attempt to place that employee at another client site, terminate the employee or allow a

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[3] This work rule did not apply only to Compuware. Mr. Mutter testified that the same work rule is instituted in any case where a subcontractor is hired by Peat Marwick to provide services to a client of Peat Marwick. (Tr., pp. 142-143; Apx., pp. 236-237)

temporary assignment to simply end by its terms. (Tr., p. 249; Apx., p. 307)

The charging party, Laurence Schillinger, was hired by Compuware on July 14, 1994 as a Computer Applications Trainer to work specifically on Project M.A.I.N. (Tr., pp. 19-20; Apx., p. 159-160) Schillinger testified that he knew at the time he was hired that he was only a temporary employee, and that his term of employment was to expire at the termination of Project M.A.I.N. (Tr., p. 20; Apx., p. 160; *see also* Written Offer of Employment, admitted as R1[4]; Apx., pp. 143-144) Schillinger was employed by Compuware for five (5) weeks. (Tr., p. 19; Apx., p. 159)

At the time Schillinger was hired, he was assigned a Compuware "Master Trainer" and a Compuware "Team Leader", to which he was to report work-related complaints and concerns.[5] (Tr., pp. 87-88, 103; Apx., pp. 203-204, 208) Schillinger testified that he was aware of the "chain of command" which he was required to follow in order to address work-related concerns or complaints. (Tr., p. 25; Apx., p. 163) In addition, Compuware trainers had other avenues available in which to voice employee concerns, including weekly "heads-up" meetings, a written employee complaint procedure, reporting to Compuware

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[4] The exhibits of Compuware were identified as R1 *et seq*, which reflects Compuware's status of respondent before the National Labor Relations Board. The exhibits of the National Labor Relations Board were identified as GC (General Counsel's) 1 *et seq*.

[5] Master Trainers are Compuware employees responsible for training and coaching other Compuware trainers, assisting in administrative duties and consulting and resolving employee issues. (Tr., pp. 318-320; Apx., pp. 352-354) In addition, a job position of "Senior Master Trainer" was created to coordinate the activities of other Master Trainers and resolve personnel issues. (Tr., p. 319; Apx., p. 353) A Compuware Team Leader is an employee designated as a primary communication source for Compuware trainers to voice work-related concerns and to assist in administrative tasks. (Tr., p. 325; Apx., p. 358)

management or reporting to Peat Marwick management. (Tr., pp. 220-221; Apx., pp. 292-293; *see also* Compuware Employee Problem Solving Procedure, admitted as R3)

Soon after Project M.A.I.N. began, Peat Marwick and the State of Michigan realized that they had underestimated the volume of training that needed to be undertaken, and some problems arose in regard to working hours, facilities and course materials for Compuware employees. (Tr., pp. 140-141, 321; Apx., pp. 234-235) Trainers, such as Schillinger, were required to work an average of fifty (50) hours per week (Tr., p. 330; Apx., p. 363). Also, some problems arose with the State facilities where the classes were being held and the State began implementing last-minute changes to course materials, leaving inadequate preparation time for Compuware trainers.

Both Compuware and Peat Marwick were aware of these concerns, and were working to fashion remedies. (Tr., pp. 140-141; Apx., pp. 234-235) In fact, in regard to the long working hours of trainers, the position of Master Trainer was created to assist in administration, more trainers were hired and a procedure was put in place by which trainers were allowed to leave the facility and return home when they did not have classes to teach. (Tr., pp. 222-223, 320-321; Apx., pp. 294-295, 354-355) The paperwork required to be filled out by Compuware employees was significantly reduced and weekly management meetings were called in order to more quickly provide course materials to Compuware trainers, and to allow more time for the trainers to learn the materials. (Tr., p. 329; Apx., p. 362) In regard to problems with the State facilities, the State of Michigan, for the most part, controlled the amount of space available for training and also controlled the climate and equipment which was available at the training site. (Tr., pp. 140-141; Apx., pp. 234-235) However, those concerns were addressed as well. The air conditioning system did not malfunction after July, (Tr., p. 223; Apx., p. 295) and additional classroom space was also provided.

Prior to being hired by Compuware, Schillinger was made

aware of the conditions at the training site, including the fact that he would be required to work long hours. (Tr., p. 97; Apx., p. 205) However, Schillinger testified that once he began working as a trainer for Compuware he was dissatisfied with the long hours, the stress and last minute revisions to course materials. (Tr., p. 32; Apx., p. 170) Schillinger also testified that some of his concerns were also shared by other Compuware trainers, and that he had conversations with some of the other trainers in regard to their common concerns. (Tr., pp. 31-32; Apx., pp. 169-170)

On August 18, 1994, Schillinger left the work site (at Project M.A.I.N.) early, complaining of a headache. (Tr., p. 34; Apx., p. 172) On the morning of August 19, 1994, Schillinger was approached by a Master Trainer, Michael Wilhite, who inquired as to whether Schillinger was feeling better. (Tr., p. 34; Apx., p. 172) Wilhite approached Schillinger in a classroom at the work site, prior to the commencement of classes that day. Also present in the room was Hugh Kessler, another Compuware applications trainer and "training partner" of Schillinger. (Tr., p. 33; Apx., p. 171) Apparently upset by an incorrect rumor that a female coworker had suffered a miscarriage due to overwork, Schillinger began shouting at Mr. Wilhite about working conditions and became very loud and disruptive. (Tr., p. 197; Apx., p. 279) Another Compuware trainer, Roger Dymond, heard Schillinger's raised voice in another classroom, and entered the classroom to request that Schillinger keep his voice down. (Tr., pp. 303-304; Apx., p. 344-345)

Schillinger testified that in the course of his confrontation with Mr. Wilhite, he informed Mr. Wilhite that he had a "union" background and was effective at "organizing people around issues." (Tr., p. 37; Apx., p. 175) In response to this, Mr. Wilhite asked Schillinger whether he was attempting to form a union, to which Schillinger replied that he was not. (Tr., p. 199; Apx., p. 281) Schillinger stated to Mr. Wilhite that he planned to attend a meeting with State of Michigan officials scheduled for later that day, at which he intended to bring up work-related concerns and complaints. (Tr., pp. 108-109; Apx., pp. 210-211) Mr. Wilhite

replied by reiterating to Schillinger that it was improper for Compuware employees to address work-related concerns directly to the State of Michigan, and that the purpose of the previously-scheduled meeting with the State was to congratulate Compuware trainers on a job well-done, and not to voice employee concerns.[6] (Tr., p. 110; Apx., p. 212) Schillinger replied, "We'll see." (Tr., p. 203; Apx., p. 285)

At the conclusion of the confrontation, Mr. Wilhite left the room and placed a telephone call to John Hess, Compuware Account Manager for Project M.A.I.N. (Tr., p. 203; Apx., p. 285) Unable to reach Mr. Hess, Mr. Wilhite spoke to J. Michael Mutter, the Peat Marwick executive in charge of training for Project M.A.I.N. (Tr., p. 204; Apx., p. 286) Mr. Wilhite told Mr. Mutter that Schillinger had threatened to approach the State of Michigan with work-related concerns at the meeting scheduled for later that day. (Tr., p. 205; Apx., p. 287) Mr. Wilhite never related to Mr. Mutter Schillinger's denial that he was forming a union nor any allegation that Schillinger was acting as a representative of other Compuware employees. (Tr., p. 219; Apx., p. 291)

After speaking with Mr. Mutter, Mr. Wilhite then successfully contacted John Hess, the Compuware account manager in charge of Project M.A.I.N. (Tr., p. 206; Apx., p. 288) Mr. Wilhite related to Mr. Hess that Schillinger had threatened to approach the State of Michigan with work-related concerns. (Tr., p. 207; Apx., p. 289) Mr. Hess indicated that he would like to speak with Schillinger by telephone, but, as Schillinger testified, Schillinger refused to do so, and again emphasized to Mr. Wilhite that he was not attempting to form a union. (Tr., pp. 43-44; Apx.,

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[6] The meeting later that day was a brief visit from Doug Johnson who was the State of Michigan Training Manager for Project M.A.I.N. Mr. Johnson was aware that the trainers had encountered some problems on the job. He decided to have a meeting with the trainers to compliment them on the fine job that they were doing under the circumstances and to advise that any necessary changes would continue to be made. (Tr., pp. 144, lines 2-25 and 145, lines 1-5; Apx., pp. 238-239)

pp. 181-182)

Since Mr. Hess was concerned with Schillinger's threat to violate an established work rule and his refusal to speak with him on the telephone, Mr. Hess drove to the work site in Lansing, and asked to have lunch with Schillinger. (Tr., p. 114; Apx., p. 216) When Mr. Hess arrived at the work site, he was approached by Hugh Kessler, who told Mr. Hess that he did not want to be associated with Schillinger. (Tr., pp. 169-170; Apx., pp. 260-261) Mr. Hess, Mr. Kessler and Schillinger thereafter proceeded to a lunch with several other Compuware trainers. (Tr., p. 54; Apx., p. 192) At lunch, several trainers, including Schillinger, communicated work-related concerns to Mr. Hess. (Tr., pp. 55-56; Apx., pp. 193-194)

Prior to lunch, Mr. Hess spoke by telephone with Michael Mutter of Peat Marwick, who stated that he had rearranged Schillinger's work schedule so that Schillinger would not be required to teach classes that afternoon, and directed Mr. Hess to send Schillinger home from the job site. (Tr., 270; Apx., p. 319) Therefore, after lunch, Mr. Hess informed Schillinger that he could take the rest of the afternoon off and go home and get some rest. (Tr., p. 270; Apx., p. 319)

Mr. Hess then proceeded to a meeting with Mr. Mutter of Peat Marwick, at which Mr. Mutter requested that the Schillinger be removed from Project M.A.I.N. (Tr., pp. 273-274; Apx., pp. 322-323) Both Mr. Mutter and Mr. Hess testified that the decision made by Peat Marwick to remove Schillinger was made solely because Schillinger had threatened to approach the State with work-related concerns, in violation of a work rule. (Tr., pp. 148-149, 273-274; Apx., pp. 242-243, 322-323) The testimony is uncontradicted that, at the time the decision was made by Peat Marwick to remove the charging party from Project M.A.I.N., neither Mr. Mutter nor Mr. Hess had any knowledge of Schillinger's prior union background, and neither person was aware of any allegation that he was attempting to form a union or was representing the interests of other Compuware employees. (Tr., pp.

149, 219, 274-275; Apx., pp. 243, 291, 323-324)

Since Schillinger was hired as only a temporary employee, Compuware had no obligation to retain him in its employ subsequent to Peat Marwick requiring that he be removed from Project M.A.I.N. (See Letter of Acknowledgment of Temporary Employee Status admitted as R2; Apx., pp. 145-146) Mr. Hess, nonetheless, considered placing Schillinger at another client site, but decided not to retain Schillinger as a Compuware employee, due to the fact that Schillinger did not possess the technical skills necessary to be placed at a different client site. (Tr., pp. 277-279; Apx., pp. 326-328) That testimony is uncontroverted.

The NLRB brought this action on behalf of Schillinger against Compuware, only, alleging a violation of Sections 8 (a)(1) and (3) of the National Labor Relations Act. (Tr., p. 5; Apx., p. 156)

PROCEDURAL HISTORY

This matter came before Administrative Law Judge, James L. Rose, in a formal proceeding commencing June 12, 1995, and concluding June 13, 1995. Judge Rose (hereinafter "ALJ") issued his five-page opinion on September 7, 1995, and found that Section 8(a)(3) of the Act had not been violated, and recommended this allegation of the Complaint be dismissed. However, the ALJ concluded that Compuware violated Section 8(a)(1) of the Act[7], and recommended certain remedies.

Compuware filed exceptions to the decision of the ALJ on October 6, 1995, and on December 18, 1995, the National Labor

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[7] Section 8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1) provides that employers commit an unfair labor practice if they "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." Section 157 guarantees employees the right, *inter alia*, "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157.

Relations Board affirmed, without analysis or opinion, the September 7, 1995 decision of ALJ Rose.[8] Compuware's Motion for Reconsideration of December 18, 1995 Decision and Order was timely filed thereafter. On August 27, 1996, the N.L.R.B. entered its Order Denying Motion (for Reconsideration).

On September 13, 1996, Compuware filed its Petition for Review of National Labor Relations Board's December 18, 1995 Decision and Order and August 27, 1996 Order Denying Motion for Reconsideration in the Court of Appeals for the Sixth Circuit. In its Petition for Review, Compuware raised the following issues: (1) whether the ALJ erred in finding that Schillinger had engaged in concerted activity; (2) whether the ALJ erred when he failed to address the issue of employer knowledge as an element required to be proven by the Board; (3) whether the ALJ erred in his conclusion that Peat Marwick was not entitled to promulgate a work rule which prohibits employee communication of work-related concerns with Peat Marwick's client; (4) whether the ALJ erred when he failed to balance Peat Marwick's work rule against any incidental effect on employee rights under the Act; (5) whether the ALJ erred in finding that an ongoing labor dispute is not required to justify employees approaching third parties with work-related complaints, and in finding that an ongoing labor dispute was present in this case; (6) whether the ALJ erred in failing to address the issue of whether Schillinger's discharge was motivated by or substantially based upon his participation in alleged protected activity; and (7) whether the ALJ erred in holding Compuware responsible for the actions of Peat Marwick.

On January 28, 1998, a panel of the Sixth Circuit, consisting of Sixth Circuit Judges Merritt and Moore and Eighth

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[8] Since the NLRB failed to outline any decisions reasoning, but merely adopted the September 7, 1995 five-page opinion of Judge Rose, the analysis of the NLRB is assumed to be identical to that in the September 7, 1995 opinion. Therefore, all analyses following by Compuware refers to the September 7, 1995 ALJ opinion, but applies to the decision of the Board as well.

Circuit Judge Bright, issued its decision in this matter. In the January 28, 1998 decision, the Court concluded that the charging party, Laurence Schillinger, had engaged in concerted activity, despite the fact that no co-worker had authorized Schillinger to represent him, because Schillinger's actions were "made on behalf of other employees", (134 F.3d at p. 1288) because Schillinger's activity was "related to group action", (134 F.3d at p. 1288) and because Schillinger "acted for the purpose of furthering group goals." (134 F.3d at p. 1288)

The Sixth Circuit rejected Compuware's argument that the ALJ erred in his conclusion that Peat Marwick was not entitled to promulgate a work rule which prohibits employee communication of work-related concerns with Peat Marwick's client. The Sixth Circuit stated that, ". . . an employer may not enforce a rule which improperly interferes with its employees' statutory right to engage in concerted activity." 134 F.3d at p. 1290. The Sixth Circuit failed to acknowledge that an employer can enact and enforce a rule that properly interferes with its employee's statutory right to engage in concerted activity and, thus, failed to balance Peat Marwick's work rule against any incidental effect on employee rights under the Act.

The Sixth Circuit, just as the ALJ, failed to address the issue of whether the charging party's discharge was motivated by or substantially based upon his participation in alleged concerted protected activity.

On February 11, 1998, Compuware timely filed its Petition for Rehearing and Suggestion for Rehearing En Banc Pursuant to Rules 35(b) and 40(a) under the Federal Rules of Appellate Procedure. That Petition was denied on March 13, 1998. On March 20, 1998, Compuware filed its Petition for Stay of Mandate Pending Petition for Writ of Certiorari in the Sixth Circuit. As of this writing, that Petition for Stay of Mandate remains pending.

REASONS FOR GRANTING THE WRIT

This case involves exceptionally important matters which require this Court's intervention. In this case, the Sixth Circuit concluded that the charging party had engaged in concerted activity, despite the fact that no co-worker had authorized the charging party to represent him, because the charging party's actions were "made on behalf of other employees, because the charging party's activity was "related to group action", and because the charging party "acted for the purpose of furthering group goals." Thus, the Sixth Circuit has held that the mere existence of common or shared concerns makes an employee's actions directed at those common concerns "concerted activity" despite the fact that the employee lacks the requisite actual authority to speak for any co-employee. The fact that common concerns had previously been discussed with other employees does not render an employee's actions concerted. That is the holding of *Manimark Corp. v. N.L.R.B.*, 7 F.3d 547 (C.A. 6 1993). The failure of the Sixth Circuit in this case to follow Sixth Circuit precedent warrants the grant of this petition for writ of certiorari.

The same holds true, i.e., that this Petition for Writ of Certiorari should be granted, because of the Sixth Circuit's determination that an employer can never institute a work rule that restricts employees' ability to communicate with third parties. This Court and the Sixth Circuit have held that an employer is not precluded from promulgating rules and regulations properly designed to protect legitimate employer interests even where such rules and regulations might have the ancillary of discouraging participation in protected activities. *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967); *Union Carbide Corp. v. N.L.R.B.*, 714 F.2d 657, 664 (C.A. 6 1983). Whether or not such a rule properly or improperly interferes with employees' rights to engage in protected activity can only be determined by a balancing between the employer's business justifications in the invasion of employee rights in light of the Act and its policies. *Jeannette Corp. v. N.L.R.B.*, 532 F.2d 1916 (C.A. 3 1976); *Texas Instruments, Inc. v. N.L.R.B.*, 637 F.2d 822 (C.A. 1 1981). Here, the

Administrative Law Judge, the National Labor Relations Board, and the Sixth Circuit failed to conduct the required balancing exercise.

Lastly, certiorari should be granted because an essential element of a claim of violation of the Act was not established. The Administrative Law Judge, the National Labor Relations Board, and the Sixth Circuit erred in failing to address the issue of whether the charging party's discharge was motivated by or substantially based upon his participation in alleged protected concerted activity. Had that issue been addressed, the necessary and only conclusion would have been that the evidence was insufficient as a matter of law to establish this element. A determination that the act has been violated, which lacks sufficient factual support with respect to an essential element of the claimed violation, cannot be permitted to stand.

ARGUMENT I

The Administrative Law Judge, the National Labor Relations Board and the Sixth Circuit erred in finding that the charging party had engaged in concerted activity.

A prima facie claim for violation of Section 8 (a)(1) of the National Labor Relations Act requires a showing that the complaining employee has been involved in "concerted activity." *Manimark Corp. v. N.L.R.B.*, 7 F.3d 547, 550 (C.A. 6 1993). The Sixth Circuit has interpreted concerted activity not to include mere "theoretical" aid or benefit to other employees. *Manimark Corp., supra*. The activity in question must be truly concerted. It is only concerted when the individual who engages in the activity does so with the authorization of the other employees who he purports to represent.

In *Manimark, supra*, the Sixth Circuit declined to follow the decision of the N.L.R.B. which found that the employee in that case had engaged in concerted activity. During the charging party's employment, Manimark employees had several work-related concerns. According to the *Manimark* Court:

> "[the charging party] and other drivers frequently discussed problems they had with the maintenance of their trucks. . . [a]nother topic of conversation was poor communication between drivers and their supervisors. . . [the charging party] also suggested that he and other drivers were upset over habitual tardiness of the supplier of Hostess products, since this delayed stocking their trucks prior to leaving work for the day." *Id.*

On one occasion, the charging party was called into the office of the company's Vice President on an unrelated matter, at which time he "informed [the Vice President] that he and other drivers had complaints about inadequate maintenance of the trucks they drove, poor communications with supervisors, and the late arrival of the Hostess supplier." *Id., at 549.*

On another occasion, the charging party was speaking with two co-employees about payment for unused sick days, when an assistant to the company controller entered. *Id.* After the assistant had explained the policy, the charging party stated that he disagreed with the policy and would address the Vice President of the Corporation in that regard. *Id.* Three days later, the charging party was discharged. *Id.*

In finding that the charging party had not engaged in concerted activity, the Sixth Circuit stated that the fact that the charging party had discussed work-related concerns with co-employees on several previous occasions and that the complaints of the charging party would aid or benefit fellow employees was not sufficient to support a finding of concerted activity. *Id., at 550.* The Court stated, "Instead, the Board must prove that the employee in question was 'acting on behalf of, or as a representative of, other employees rather than acting for the benefit of other employees only in a theoretical sense.'" *Id.* (Quoting, *ARO, Inc. v. N.L.R.B.*, 596 F.2d 713, 717 (C.A. 6 1979)). The Court went on to state that the employee "must be actually, rather than impliedly, representing the views of other employees." *Id.* (Quoting, *Jim Causley Pontiac v.*

N.L.R.B., 620 F.2d 122, 126 n. 7 (C.A. 6 1980)).

"This Court has never held that an employee's action in merely repeating the jointly held concerns of other employees, standing alone, suffices for a finding of concerted action." *Manimark Corp., supra, at 551.* Rather, the Sixth Circuit has rejected the notion that an employee's complaint was concerted because it was of common concern to other employees. "An inquiry into the concerted nature of conduct should not focus solely upon the group nature of the complaints." *Manimark Corp., supra, at 551.* There must be evidence that the employee was actually, rather than constructively or impliedly, representing the views of other employees. *Manimark Corp., supra, at 550.* Then, and only then, can it be said that the employee was acting on behalf of other employees. Then, and only then, is the activity concerted.

Simply put, no matter how much or how strongly one "intends" to or is "willing" to act on behalf of others, that alone is insufficient. There must be proof[9] that the employee in question was acting with the authorization of other employees. *Manimark Corp., supra.* The former without the latter is legally insufficient to establish that an individual's actions were concerted. The former is all that exists in this case.

The testimony in the present case demonstrates that, while the concerns of Schillinger may have been shared by other coworkers, there is no evidence that he was "representing" the interests of the other employees. While Schillinger testified that he frequently spoke with other employees about common, work-related concerns, the N.L.R.B. presented no absolutely evidence to indicate that Schillinger ever consulted or spoke with fellow employees regarding representing common concerns to Compuware management.

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[9] The Board had the burden of proving that Schillinger had the authorization of others to act on their behalf. Compuware did not have the burden to disprove it.

The testimony given by other Compuware employees shows Schillinger's coworkers expressly disavowed being associated with him. For example, Schillinger's "training partner", Hugh Kessler, testified that he expressly told John Hess, the account manager, that he did not want to be associated with Schillinger and that he did not "need anyone else taking care of me." (Tr., pp. 169-170; Apx., pp. 260-261) Master Trainer Mike Wilhite testified that five to six other trainers approached him and told him that they did not want to be associated with Schillinger. (Tr., pp. 227-228; Apx., pp. 296-297) In fact, every Compuware employee that testified stated that they did not want Schillinger to represent their concerns to management, and that they had not spoken to any other Compuware employee who wanted Schillinger to represent their concerns to management.

The ALJ acknowledged the testimony that Schillinger did not have the support of other employees, as follows:

> "Employee Hugh Kessler testified that he told Hess privately that he agreed with many of Schillinger's concerns, but he did not agree with Schillinger's approach. Employee Roger Diamond [sic], called as a witness by the Respondent, testified that Schillinger told Wilhite he intended to speak for all employees at the "Heads Up" meeting. Diamond [sic] further testified that he had not authorized Schillinger to do so. And Wilhite testified that five other trainers told him they did not want to be associated with Schillinger." (Opinion p. 4, lines 21-26; Apx., pp. 31)[10]

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[10] Nevertheless, the ALJ disregarded that testimony by concluding that "such testimony does not prove that Schillinger did not have the authorization of others . . . ." (Opinion, p 4, lines 26-27; Apx., pp. 31) This is an error which ignores the proper allocation of the burden of proof. The ALJ has it backwards. His conclusion ignores the proper allocation of the burden of proof. It was the Board's burden to establish that Schillinger was engaged in concerted activity and not Compuware's burden to show that he was not. At no time did the Board meet its evidentiary burden by presenting

In the January 28, 1998 decision, the Sixth Circuit concluded that the charging party, Laurence Schillinger (Schillinger), had engaged in concerted activity, despite the fact that no co-worker had authorized Schillinger to represent him, because Schillinger's actions were "made on behalf of other employees", because Schillinger's activity was "related to group action", and because Schillinger "acted for the purpose of furthering group goals." Therein the foundational error in the Sixth Circuit's analysis lies. The actions of Schillinger can, in no manner, be characterized as "concerted" because he never had any other employee's authorization to speak for him.

Just because one employee shares common concerns with others and that employee makes the unilateral decision to discuss those concerns with management (or in this case with management's client), does not mean that the employee has the requisite actual authority to do so. The fact that common concerns had previously been discussed with other employees does not render an employee's actions concerted. That is the holding of Manimark Corp. v. N.L.R.B. supra.

Concerted action cannot be imputed from the object of the action. *Prill v. N.L.R.B.*, 835 F.2d 1481, 1483 (C.A. D.C. 1987) *cert. denied* 487 U.S. 1205; 108 S. Ct. 2847; 101 L. Ed. 2d 884 (1988). Actual, rather than implied or constructive, authority to represent the views of other employees is an absolute prerequisite to a finding of concerted action. *Manimark, supra,* at 550. In fact, the N.L.R.B. admitted in this case, as it must, that in order for activity to be concerted, it must be engaged in with the authority of other employees. Sixth Circuit brief for the National Labor Relations Board, pp. 15-16. The Sixth Circuit, although ostensibly acknowledging the actual authorization requirement 134 F.3d at p. 1288, completely dispensed with it. The Sixth Circuit found that Schillinger had engaged in concerted activity despite the utter lack

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evidence which demonstrated that Schillinger had the authorization of others. In fact, the only evidence presented was to the contrary.

of proof that he had any authority from any other employee to represent his interests.

The Sixth Circuit's characterization of Compuware's argument demonstrates the core error in the Sixth Circuit's analysis. The Sixth Circuit stated that ". . . Compuware argues that the Board did not show Schillinger was acting for the group." 134 F.3d at p. 1289. Based on that characterization of Compuware's argument, the Sixth Circuit stated that, ". . . the relevant question is whether the employee acted with the purpose of furthering group goals." That is not Compuware's argument and that is not the relevant question. An employee may act all day long with the purpose of furthering group goals. Yet, if he does not have the actual authority of other employees to do so on their behalves, his action is not concerted.

The difference is subtle but significant in that it is outcome determinative. If Schillinger was acting for the group or on behalf of other employees, solely in the sense that his unauthorized acts were directed at common concerns, then that is not concerted. But, if Schillinger was acting for the group or on behalf of other employees, in the sense that another employee had authorized Schillinger to speak for him, then that is concerted activity. The former is all that was proven in this case. There is no evidence of the latter.

The sum and substance of the Board's argument (which was accepted by the Sixth Circuit) on the issue of whether Schillinger was engaged in concerted activity was set forth in its Summary of Argument. The Board stated that:

> "Schillinger's proposed action was concerted because he intended to act on behalf of other employees who on numerous occasions raised their grievances to the Company." (Underlining supplied.)

Sixth Circuit brief for the National Labor Relations Board, p. 12.

The statement of the position itself demonstrates the lack of merit in the argument and the foundational error committed by the Administrative Law Judge, by the Board and by the Sixth Circuit in this case.

The ALJ, the Board, and the Sixth Circuit, seem to believe that authorization, and thus the concerted nature of the activity, can be established by one employee's unilateral intent to represent others and his statement of a willingness to do so. This is not the law nor should it be. By analogy, many people want to represent others. They are known as politicians. Their mere desire or intent to represent others, however, is not sufficient. The only legally recognized representatives are those who obtain authorization to do so in the form of votes. Without affirmative authorizations, a person, even one who intends to represent others, acts alone. Mr. Schillinger's intent to represent other employees and his expression of a willingness to do so, without any evidence of their acquiescence in him so doing (and there is no such evidence in this record - - in fact, the evidence is to the contrary), proves nothing more than that Mr. Schillinger acted alone.

The fact that a charging party had discussed work related concerns with co-employees on several previous occasions and the fact that the complaints of the charging party would aid or benefit fellow employees is not sufficient to support a finding of concerted activity. That was the result reached by Judges' Kennedy, Norris, and Krupansky in *Manimark Corp.*, and that is the result which the Sixth Circuit in this case should have reached. Certiorari is necessary to resolve the conflict between *Manimark Corp., supra,* and the decision in the instant case with the result being a statement by this Court that the rule of *Manimark Corp., supra,* is correct and that the decision in the instant case is simply wrong.

At bottom, the position advanced by Compuware and supported by *Manimark, supra,* concerning the absolute necessity of actual authorization is the only position which makes logical sense. One can sit around and discuss common concerns or problems with another employee until the end of the day. One can

even sit there while that employee discusses them with management. One can even attend a meeting at which that other employee has indicated he intends to raise those concerns. That does not mean that one wants him to speak on his behalf to management. Until proven otherwise, the assumption must be that one wants to say his own peace on his own behalf and not have his right to do so usurped by a "volunteer" whose invitation has not been accepted. Compuware contends that this Court, on certiorari, should forthrightly acknowledge actual authority as a precondition to concerted activity and acknowledge that actual authority must be proven.

Compuware further contends that the Sixth Circuit's decision cannot and should not be sustained by overlooking the Sixth Circuit's erroneous analysis of what actual authority means and by concluding that, as a matter of fact, actual authority was established. To be sure, the Sixth Circuit in this case stated that, ". . . some of the other trainers had previously commented that because Schillinger, who had been a union steward at a former job, 'knows this stuff, he should talk to management people.'" (134 F.3d at p. 1290) That is insufficient evidence to support a determination that Schillinger was acting on behalf of any other employee when he made the threat to approach the representatives of the State of Michigan. The above-quoted factual statement by the Sixth Circuit is taken from p. 5 of the N.L.R.B. brief where the N.L.R.B., stated that:

> "On a couple of occasions when employees discussed their grievances, some trainers commented that because Schillinger, who had been a union steward at a former job, 'knows this stuff, he should talk to management people.'"

The Board cited to 14 pages of the joint appendix to ostensibly support that statement. Nothing Schillinger said supports it. Nothing Wilhite (the Compuware master trainer) said supports it. All that is in the record is a statement of Kessler (Schillinger's partner) that he thought he heard a couple of "unidentified" trainers

say that they wanted Schillinger to present their concerns to Compuware management.

This is not sufficient evidence of authorization because (1) the speakers were not identified, (2) no person testified that he or she said it, (3) Compuware offered the testimony of two trainers to testify explicitly that they did not authorize Schillinger to represent them (and the Board offered no one to say that they did) and (4) in any event, at very most, those unidentified persons wanted Schillinger to speak to Compuware management, not Peat Marwick and, most significantly, not the State of Michigan. On those undisputed facts, it is not reasonable to conclude that any person actually authorized Schillinger to represent him or her with respect to voicing his or her concerns directly to the representatives of the State of Michigan.

In summary, while employees may share a concern relating to a term or condition of employment, they must still do something to authorize an individual to represent their interests in order for his actions to be concerted. Any other rule would effectively eliminate the authorization requirement and the law would be that an individual's unilateral activities with respect to common concerns would amount to concerted action. That is simply not the law.

ARGUMENT II

The Administrative Law Judge, the National Labor Relations Board and the Sixth Circuit erred in the conclusion that Peat Marwick was absolutely precluded from promulgating a work rule which prohibited employee communications of work-related concerns to Peat Marwick's client and, for that reason, in failing to balance the legitimate interests protected by the work rule against any incidental effect on employee rights under the Act.

The ALJ, the National Labor Relations Board, and the Sixth Circuit erred in the conclusion that as a matter of law, an employer

may not adopt a work rule or policy prohibiting its employees from complaining to the employer's customers regarding working conditions. The crux of the decision is that such a rule is, itself, a violation of Section 7 and, therefore, termination of an employee for violating or threatening to violate such a rule is improper. The conclusion is not tenable.

The position taken by the Board, and accepted by the Sixth Circuit, is that, as a matter of law, an employer may not adopt a work rule or policy prohibiting employees from complaining to the employer's customers regarding work conditions. The position taken by Compuware is that a rule prohibiting employees from raising complaints with an employer's customers is valid when it furthers the legitimate and substantial interests of the employer.

The fact that an activity is concerted[11] does not necessarily mean that an employee can engage in the activity with impunity. *N.L.R.B. v. City Disposal Sys., Inc.*, 465 U.S. 822, 837; 104 S. Ct. 1505, 1514; 79 L. Ed. 2d 839 (1984); *Aroostook County Regional Ophthalmology Center v. N.L.R.B.*, 81 F.3d 209, 214 (DC Cir. 1996) citing *N.L.R.B. v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 266 (C.A. 9 1995). "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time." *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803 n. 10; 65 S. Ct. 982; 89 L. Ed. 1372 (1945)

The Sixth Circuit has held that an employer is not precluded from promulgating rules and regulations properly designed to protect legitimate employer interests even where such rules and regulations might have the ancillary effect of discouraging participation in protected activities. *Union Carbide Corp. v. N.L.R.B.*, 714 F.2d 657, 664 (C. A. 6 1983).

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[11] This argument assumes that the Court disagrees with Compuware's preceding argument concerning the solitary nature of Mr. Schillinger's activities.

It is well-established that an employer may adopt a work rule or policy that inhibits protected activity as long as the employer demonstrates "legitimate and substantial business justifications" for the rule. *See e.g., N.L.R.B. v. Fleetwood Trailer Co. Inc.*, 389 U.S. 375, 378 (1967); *N.L.R.B. v. Jemco, Inc.*, 465 F.2d 1148, 1152, n 7 (C.A. 6 1972); *Jeannette Corp. v. N.L.R.B., supra,* at p. 1918.

It is clear that a rule prohibiting employees from raising complaints or concerns with an employer's customers furthers the legitimate and substantial interests of the employer. *N.L.R.B. v. Redtop, Inc.*, 455 F.2d 721 (C.A. 8 1992) is directly on point.

Redtop, Inc., was in the business of providing janitorial services to hospitals. The services in each hospital were provided by separate shifts. The shifts elected advisory committees to represent the employees in disputes with management. The advisory committee for the night shift at one hospital raised a variety of complaints regarding the management's misuse of funds, firing of employees and lack of promotion. *N.L.R.B. v. Redtop, Inc., supra*, at pp. 722-723.

One of the members of the advisory committee, a Mr. Svoboda, threatened in a letter to his employer that he would take these problems to the hospital administration if management did not resolve them. *N.L.R.B. v. Redtop, Inc.*, supra, at p. 727. He threatened to do this even though:

> ". . . the committee members had been previously informed that they should submit grievances to the local manager and if the grievances could not be resolved on that level, take them to . . . Redtop's regional director."

N.L.R.B. v. Redtop, Inc., supra, at p. 727.

The court, in upholding the employee's discharge, recognized that a threat to involve a client in such disputes constituted improper interference with the employer's commercial interest:

> "It is a natural inference that if the hospital is involved in these disputes, it would become dissatisfied with the company." Id.

Moreover, because the employee made such a threat in direct disregard of the known chain of command, the threat could not "constitute a bid for public sympathy or support such as peaceful picketing, but was clearly designed to hit the employer where it would hurt, by interfering with its business relations with its customers." *Id.* Rather, "the threat . . . to take the problems to the hospital administration constituted an act of disloyalty to the employer's business interest." *Id.* The court found, therefore, that the discharge of Svoboda was justified and denied enforcement of an order of the Board requiring his reinstatement.

It is clear then, under *N.L.R.B. v. Redtop, Inc., supra,* that when an employee disregards the chain of command for presenting complaints regarding working conditions and threatens to complain to the employer's customers, discharge is justified. Such a threat is clearly disloyal and improperly threatens to interfere with the employer's legitimate business interest. It is equally clear under *N.L.R.B. v. Redtop, Inc., supra,* that an employer may adopt a rule[12] or policy establishing a chain of command or procedure for presenting complaints that would prohibit such disloyalty and improper conduct.

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[12] In this case, Michael Mutter, the Peat Marwick executive in charge of the training portion of Project M.A.I.N., testified that the reason for the work rule prohibiting Compuware employees from approaching the State of Michigan was to preserve the relationship between Peat Marwick and the State of Michigan, to avoid embarrassment and to maintain an orderly chain of command and system for addressing employee complaints. (Tr., p. 146; Apx., p. 240) This is a legitimate work rule, intended to protect the bona fide business interests of Peat Marwick. Indeed, the work rule was promulgated and in place prior to the hiring of Schillinger and Mr. Mutter testified that the work rule is instituted for every subcontractor hired by Peat Marwick. (Tr., pp. 142-143; Apx., pp. 236-237)

The case at bar is virtually identical to *N.L.R.B. v. Redtop, Inc., supra*. Schillinger threatened to bring up his complaints with the client's client, the State of Michigan. He did this despite being aware of the chain of command which he was to follow in order to address work related concerns or complaints.

Indeed, the employee's actions in the case at bar posed a greater threat than those in *N.L.R.B. v. Redtop, Inc., supra*. Here, the employee's threat posed a serious risk to three relationships: the relationship between Compuware and Peat Marwick, the relationship between Compuware and the State of Michigan, and the relationship between Peat Marwick and the State of Michigan. Obviously, Peat Marwick would be dissatisfied with Compuware if Compuware employees involved the State of Michigan in such a dispute. Similarly, the State of Michigan would be dissatisfied with both Peat Marwick and Compuware if it became involved in such a dispute. In light of the holding in to *N.L.R.B. v. Redtop, Inc., supra*, the discharge of an employee who makes such threats is entirely justified.

Compuware's position is further supported by the court's decision in *N.L.R.B. v. Knuth Bros., supra*. In *N.L.R.B. v. Knuth Bros., supra*, the employer was a wholesale printer of business forms. It did almost all of its work on a subcontract basis; and it received all of its business from dealers and had no contact with the ultimate end user of the forms. *N.L.R.B. v. Knuth Bros., supra*, at 951.

The respondent discharged one of its employees who, in the course of a union organizational campaign, contacted an end user and inquired why that end user was having its forms printed at respondent's non-union place of business. *N.L.R.B. v. Knuth Bros., supra*, at 952. The court recognized that, as in the case at bar, this conduct of the employee posed a threat to a three-way business relationship; i.e., the relationship between the employer, the dealer and the end user. *N.L.R.B. v. Knuth Bros., supra*, at 959.

The court held, therefore, that contacting the end user and informing the end user that printing work was being done for it by a non-organized company posed a significant threat to the employer's

business interest even though the employee may have been engaged in an organizational campaign:

> "In reviewing the information, Popovich acted in reckless disregard of his employer's business interest. Respondent had the right to expect its employees to use greater care in using information acquired in the course of their employment. Failure to use such care was an act of disloyalty to respondent. His avowed purpose of aiding the organizational campaign is insufficient to protect him from the effects of his misconduct and constitute a cause for discharge." *N.L.R.B. v. Knuth Bros., supra,* at 956.

It should be noted that the employer in *N.L.R.B. v. Knuth Bros., supra*, argued that it had a rule prohibiting such disclosures and contact with end users. However, the court recognized that the employee's conduct was such an obvious violation of the employer's interest that an explicit rule prohibiting such conduct was not necessary:

> "Since Popovich was a pressman, he never had any excuse whatever for meddling in his employer's dealings with its customers, and an explicit prohibition would not be necessary. Popovich's conduct was clearly far beyond the scope of duties for which he was paid, and thus he must be held to have been aware that he was meddling in his employer's business affair without authorization. Therefore, respondent was legally entitled to treat him just as it would any other employee who so seriously disrupts his employer's business." *N.L.R.B. v. Knuth Bros., supra,* at 956 (quoting from N.L.R.B. dissenting statement).

Thus, under *N.L.R.B. v. Knuth Bros., supra,* not only is the employer entitled to discharge an employee who disrupts or

threatens to disrupt an employer's business relationships, an employer may discharge the employee for such conduct even in the absence of a rule. Furthermore, discharge is appropriate even if the employee's communication was made in connection with protected activity.

It is clear then that well-established law recognizes that an employer may adopt policies or rules to regulate the manner in which Section 7 rights are exercised. It is clear that a policy or rule establishing a chain of command prohibiting employees from taking their grievances to their employer's customers are entirely legitimate. It is also clear under the law that discharging an employee for violating such a rule is justified. Indeed, it is well recognized that an employee who threatens an employer's relationship with its customers can be discharged even if such conduct is associated with the exercise of Section 7 rights.

Therefore, the ALJ's, the National Labor Relations Board's, and the Sixth Circuit's conclusion that a company may never adopt a rule establishing a chain of command which precludes employees from involving customers in grievances and the conclusion that an employer may not discharge an employee who threatens to involve customers in grievances are contrary to well-established law.

This conclusion is further bolstered when one acknowledges that the Act does not give employees carte blanche in choosing the method of presentation, or in their choice of time and place, for making such employment-related complaints. *N.L.R.B. v. Truck Drivers Oil Filling Station and Platform Workers' Union*, 630 F.2d 505, 508 (C.A. 7 1980). In *N.L.R.B. v. Truck Drivers Oil Filling Station, supra*, the Seventh Circuit found that employees who failed to follow established procedures in seeking wage increases lost the protection of the Act when making complaints. The court stated that the employees' failure to follow established procedures in airing their complaints formed "a reasonable basis for withholding the normal protection afforded" to such activities. *Id.*

The ALJ attempted to distinguish *N.L.R.B. v. Truck Drivers*

Oil Filling Station, supra, on the basis that the employee's disregarding of proper procedures "was not the basis for denial of enforcement." (Opinion, p. 6, lines 12-13; Apx., p. 33) This is not the case. While the employees in *N.L.R.B. v. Truck Drivers Oil Filling Station, supra*, had engaged in other improper activities, their violation of established work rules clearly played a part in their dismissal. The court stated:

> "They [the employees] were fully informed of the established procedure to follow in seeking wage increases. . . . Yet they elected to disregard established procedures and to present wage complaints at a meeting attended by stewards who are not employed by the Union, to the potential embarrassment of the Union and its leader who was conducting the meeting." Id., at 508.

The court recognized that the Act is not violated when an employer limits the forums for presenting work-related grievances. In this case, testimony revealed that Schillinger had up to seven (7) other avenues in which to air his work-related complaints. (Tr., p 220; Apx., p. 292) In fact, he testified that he was aware of these other avenues in which to voice his work-related concerns. (Tr., pp. 25, 87-88, 103-104; Apx., pp. 163, 203-204, 208-209) Yet, he failed to avail himself of any of those avenues. For example, he testified that he never raised work-related concerns at weekly "heads up" meetings with Compuware and Peat Marwick management, a forum created specifically for addressing and resolving employee concerns. (Tr., p. 98; Apx., p. 206)

It is clear that the work rule promulgated by Peat Marwick which prevented Compuware employees from approaching the State of Michigan directly was a legitimate work rule, and that Peat Marwick was entitled to promulgate such a rule even if it had the ancillary effect of limiting one forum in which the charging party could voice his work-related concerns. Since it is clear, pursuant to the authority of *N.L.R.B. v. Truck Drivers Oil Filling Station, supra*, that employees do not have carte blanche in choosing the

method of presentation, the time of presentation or the place for making such complaints, limiting only one forum for employees' complaints, while providing seven (7) other methods for airing employees' complaints clearly does not violate the Act.

Thus, the question which was presented in this case (and, for that matter, every similar case involving a work rule restricting employee complaints and legitimate and substantial interests of the employer), and which was never decided at any stage in this litigation, is whether the work rule in question struck a proper balance between employee rights and the legitimate concerns of the employer.[13]

If an employer work rule is proven to infringe on the protected rights of an employee, the employer must demonstrate "legitimate and substantial business justification for his conduct." *Jeannette Corp v. N.L.R.B., supra; Texas Instruments, Inc. v. N.L.R.B.*, 637 F.2d 822 (C.A. 1 1981); *Handicabs, Inc. v N.L.R.B.*, 95 F.3d 681, 684-685 (C.A. 8 1996). In this case, the testimony of Michael Mutter, cited previously, supplies a legitimate business justification for the work rule restricting employees from approaching Peat Marwick's client with work-related concerns.

Once a legitimate business justification is supplied by the employer, the Board must "strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *Id.* (citation omitted). The ALJ, the National Labor Relations Board, and the Sixth Circuit erroneously failed to conduct the required balancing exercise. Had any of them engaged in this proper analysis, it is clear that the employer's interest in promulgating this work rule outweighs the incidental and minor infringement on the employee's right to air work-related concerns in a

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[13] "The reach of § 7 [of the N.L.R.A.] has posed difficult questions involving the balancing of an employee's right to engage in concerted activities against the employer's right to maintain order and control . . . ." 1 *The Developing Labor Law*, 144 (Morris et. al., Ed., Second Edition 1983).

particular forum. Since employees had available no less than seven (7) other avenues for airing work-related complaints, none of which were utilized by Schillinger, it is clear that the limiting of only one forum in which the employee may air complaints does not outweigh the legitimate work rule of Peat Marwick. This minor infringement on the employee's right to air work-related complaints, while still leaving available equally-effective, alternate methods of airing those grievances, does not outweigh the employer's right to promulgate a rule designed to maintain order and efficiency in the work place.

ARGUMENT III

The Administrative Law Judge, the National Labor Relations Board, and the Sixth Circuit erred in failing to address the issue of employer knowledge of the asserted concerted nature of the charging party's activity as an element required to be proven by the Board.

The third element of a prima facie claim of violation of the N.L.R.A. requires that the employer have knowledge that an employee is engaging in protected, concerted activity. *Ajax Paving Industries, Inc. v. N.L.R.B.*, 713 F.2d 1214, 1218 (C.A. 6 1983). The rule is stated as follows:

> "In order to find that the employer has committed an unfair labor practice by taking adverse action against an employee who engages in protected, concerted activity, the Board must determine that the employer knew of the concerted nature of the employees' conduct." *Id., at 1219.*

In this case, the ALJ, the National Labor Relations Board, and the Sixth Circuit failed to even address the requirement of employer knowledge. That element (which is simply one of cause in fact) was not and cannot be satisfied. The evidence is uncontroverted that neither Peat Marwick nor Compuware had knowledge that Schillinger claimed to be representing the interests of other employees at the time the decision was made to remove

Schillinger from the Project M.A.I.N. work site. (Tr., pp. 149, 219, 274-275; Apx., pp. 243, 291, 323-324) Master Trainer Mike Wilhite, the trainer involved in the confrontation with Schillinger on August 19, testified that he told neither Michael Mutter of Peat Marwick nor John Hess of Compuware that Schillinger had a "union background" or that he was supposedly representing or speaking on behalf of other Compuware employees. (Tr., p. 219; Apx., p. 291)

In fact, the only knowledge in the possession of John Hess at the time the decision was made to remove Schillinger from the work site was that other employees did not want to be associated with Schillinger, based upon statements made to Hess by employee Hugh Kessler. (Tr., p. 266; Apx., p. 315) The only person who had knowledge of Schillinger's "union background" or any alleged "concerned" activity was Master Trainer Mike Wilhite, and it is undisputed that Mr. Wilhite is not a supervisor, and played no role in the termination of Schillinger, so his knowledge or lack thereof is irrelevant. (Tr., p. 229; Apx., p. 298)

The N.L.R.B. presented no evidence that the management of either Peat Marwick or Compuware had any knowledge concerning Schillinger's alleged "union background" or any "concerted" activity. To the contrary, the only information supplied to management was that other employees did not want to be associated with Schillinger. As such, the Board failed to sustain this element of its prima facie claim, and the complaint should have been dismissed.

CONCLUSION

Based upon the reasons stated above and the record as a whole, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

/s/_____
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APPENDIX

APPENDIX A

JD-135-95 Detroit, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD DIVISION OF JUDGES

Case 7-CA-36731

COMPUWARE CORPORATION

and

LAURENCE SCHILLINGER, An Individual

Dennis Boren. Esq., of Detroit, Michigan, for the General Counsel.

Anthony J. Rusciano of Detroit, Michigan, and *Daniel M. Sak. Esq.*, of Farmington, Hills, Michigan, for the Respondent.

DECISION

Statement of the Case

James L. Rose, Administrative Law Judge: This matter was tried before me on June 12 and 13, 1995, at Detroit, Michigan, upon the General Counsel's complaint which

alleged that on August 22, 1994,[1] the Respondent discharged Laurence Schillinger in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*

The Respondent admitted the discharge of Schillinger on August 22, but denied that it had thereby engaged in an violation of the Act. The Respondent affirmatively contends that the activity for which Schillinger was discharged was not concerted or protected by Section 7 of the Act.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

I. JURISDICTION

The Respondent is a Michigan corporation engaged in providing computer software and services to various companies, during the course of which business it annually derives gross revenues in excess of $1,000,000 and annually provides services to customers outside the State of Michigan in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2). 2(6) and 2(7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

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[1] All dates are in 1994 unless otherwise indicated.

A. The Facts in Brief.

There is no significant dispute concerning the material facts. KPMG Peat Marwick had a contract with the State of Michigan for an extensive upgrading of the State's computer system. Peat Marwich in turn contracted with the Respondent to furnish support personnel to train State employees on he new system. The Respondent then hired about 38 employees on a temporary basis to work as trainers. (When the Peat Marwich project was completed in November, about one-half of the temporary employees were given other jobs with the Respondent.)

The Charging Party, Laurence Schillinger, was interviewed and by letter of July 6, was offered a temporary trainer position. His job, as that of all the trainers, was to learn specific courses, become certified to teach them, and do so. While the hiring letter stated that he was to work approximately 40 hours a week, it happened that the trainers were required to put in much longer hours - usually 57 or so each week.

In addition to the long hours plus a substantial commute for most trainers, Schillinger testified to other employment concerns, such as inadequate preparation time. and the failure of the Respondent to pay overtime premiums.

Schillinger testified that almost from the beginning of his employment he discussed these problems with other employees. And on the morning of August 19, Schillinger had a discussion about these matters with Master Trainer Michael Wilhite (whom the parties stipulated was an employee and not

a supervisor within the meaning of Section 2(11) of the Act), at which employees Hugh Kessler and Roger Diamond were present. During this discussion. Schillinger became agitated and told Wilhite that if nothing satisfactory was done. he would express these concerns at a meeting scheduled that afternoon at which there would be representatives of the State as well as Peat Marwich.

Wilhite told Schillinger that it would be improper for him to bring up these problems at the meeting with State representatives, to which, Wilhite testified, Schillinger said, "We'll see." Wilhite called John Hess, the Respondent's account manager for this project to report Schillinger's intent. Hess' was not available and Wilhite left a voice mail message; but he also called James Michael Mutter, who at the time was the Peat Marwich on site team leader for the project.

Mutter was concerned that Schillinger would in fact raise these issues with the client, and absent assurance he would not, Mutter wanted him taken off the project. Mutter and Hess testified that Peat Marwick retained the right to require the Respondent to withdraw any employee from the project.

Hess returned Wilhite's call, learned of the situation and came to the project. He talked with Schillinger and Wilhite and at Schillinger's invitation, joined several trainers for lunch to talk about various work related problems. Shortly thereafter, Hess talked to Mutter, who stated he was so concerned that Schillinger might by-pass the chain of command that he was considering canceling the meeting. Mutter asked if Hess could give him assurances that

Schillinger would not bring up these problems at the meeting, and when Hess could not, Mutter said he would have to find out what to do. However, it appears, though somewhat unclear, that Mutter first told Hess that Schillinger should not go to the meeting and told him to give Schillinger the rest of the day off. Then Mutter checked with his superiors and they concluded that Schillinger should be replaced, and this order came later.

Saturday Hess called Schillinger and asked him to report to Hess's office on Monday, August 22. Schillinger did so and was informed by Hess that he was being terminated from the project at the direction of Peat Marwick. Since Schillinger was a temporary employee for that particular project, and, according to Hess, deemed insufficiently skilled for other jobs, he was terminated from employment with the Respondent.

B. Analysis and Concluding Findings.

During Schillinger's August 19 discussion with Wilhite, Schillinger noted that he was an experienced union steward and that the employees could use his expertise in resolving the employment problems. Wilhite asked if he was trying to organize a union and Schillinger said no. Wilhite did not relay this particular statement of Schillinger's to Hess or Mutter, although later in the afternoon, without input from Wilhite, Hess asked if Schillinger was there to organize and Wilhite said "Absolutely not" (using Schillinger's words from the morning). Other than these two statements, there is no evidence that any activity on behalf of any labor organization played a role in the Respondent's decision to terminate

Schillinger. I do not believe that Schillinger's statement to Wilhite and Hess's question are sufficient to establish a violation of Section 8(a)(3). Therefore, I conclude that a Section 8(a)(3) violation has not been proven by a preponderance of the credible evidence and I shall recommend that this allegation of the complaint be dismissed.

However, I further conclude that Schillinger had been engaged in concerted activity protected by Section 7 of the Act, and he was terminated because of a perception that he might continue to do so by expressing concerns of employees at a meeting to be attended by representatives of the 'State of Michigan. I conclude that Schillinger was not terminated so much for what he did as what Mutter and Hess believed he might do if he continued as an employee.

The Respondent does not dispute that the subject matter discussed by Schillinger with Wilhite and Hess, and which he indicated he would present at the meeting involved issues of mutual aid and protection within the meaning of Section 7. However, the Respondent contends that Schillinger was, and would have been, acting alone, or in any event had other reasonable avenues of presenting these concerns without airing them to the Peat Marwick client.

One of the seven avenues the Respondent argues was available to Schillinger was the weekly "Heads Up" meeting. According to Wilhite it was such a meeting which was to be held on August 19; however, since representatives of Michigan we-re planning to attend in order to tell the Respondent's employees what a great job they were doing, to air grievances then would have been inappropriate.

Citing *Manimark Corp. v. NLRB*, 7 F.3d 547 (6th Cir, 1993), the Respondent argues that in order to find an employee has engaged in concerted activity, it must be shown that he did more than merely repeat to management jointly held concerns of other employees. In *Manimark*. the employee never told other employees what he was going to do or that he had contacted management. Thus the Court found that he was acting in concert with other employees only in a "theoretical sense" and such was insufficient to support a violation. Such is not the situation here.

The evidence here establishes that the concerns of employees were being presented to Hess in concert. Schillinger invited Hess to lunch with employees in order to discuss their problems. Hess accepted and heard each employee make a statement. Schillinger opened and closed the discussion.

Employee Hugh Kessler testified that he told Hess privately that he agreed with many of Schillinger's concerns, but he did not agree with Schillinger's approach. Employee Roger Diamond, called as a witness by the Respondent; testified that Schillinger told WILHITE he intended to speak for all employees at the "Heads Up" meeting. Diamond further testified that he had not authorized Schillinger to do so. And Wilhite testified that five other trainers told him they did not wish to be associated with Schillinger.[2] But, this does

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[2] This was unobjected to hearsay and is therefore considered for the truth of the fact assertion. *Passaic Daily News v. NLRB*. 736 F.2d 1543, 1554 n. 15 (D.C. Cir. 1984).

not prove that. Schillinger did not have the authorization of others or, more importantly, would not have been engaged in the furtherance of concerted action had he attended and spoken at the afternoon meeting.

Notwithstanding evidence that Schillinger did not have the total support of other trainers, I conclude that his activity was concerted within the meaning of the Act. Employees had discussed these matters and following Schillinger talking with WILHITE on the morning of August 19, Hess met with Schillinger and others at noon during which their concerns were discussed.

Clearly the activity of Schillinger comes within the broad definition of "concerted activity" accepted by the Board in *Meyers/Industries, Inc.*, 281 NLRB 882 (1986) *(Meyers If)* which "encompasses those circumstances where individual employees seek to initiate or induce or to prepare for group action .... "281 NLRB at 887. The fact that an employee may act alone during some phase of concerted presentation of employee grievances does not mean he is thereby outside the protection of the Act. See also *Mushroom Transportation Co. v. NLRB*. 330 F.2d 683 (3d Cir. 1964).

Unlike *Manimark* and other cases cited by the Respondent, the discharge of Schillinger was a preemptive strike. It was unknown to Mutter, and I find of no importance to him, whether Schillinger's intention to speak at the afternoon meeting was to be in aid of concerted activity. Mutter told Hess to remove Schillinger because Schillinger said he would bring up employee grievances at the meeting. Mutter's order had nothing to do with whether Schillinger

intended to act alone or in concert. But the Respondent argues that Schillinger was (or would have been) acting alone; therefore, discharging him was not a violation of the Act. I disagree, and conclude that if Schillinger had been allowed to attend the meeting and had he spoken, it is more probable than not that he would have been engaged in concerted activity.

Citing *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953), the Respondent argues there are limits to concerted activity which is protected. In *Jefferson Standard,* employees had directed handbills to customers of the TV station which, in essence, suggested that the TV station was not giving its customers good service. For this the employees were discharged. The Respondent analogizes the customers in *Jefferson Standard* with the client of Peat Marwick in this matter, mile that analogy may be reasonable, the message to be delivered here is fundamentally different from that in *Jefferson Standard.* The message in *Jefferson Standard* had nothing to do with the wages, hours, or other terms and conditions of employment of the employees. Here Schillinger complained about, and intended to bring up, matters directly relating to the employment of all the trainers - long hours, inadequate preparation time, failure to pay overtime and the like.

The question is whether an employer can make (or as is the case here, acquiesce in) a rule that restricts employees' ability to engage in concerted activity by prohibiting communication with third parties. I conclude not. The Board has repeatedly held that employees may, with the protection of Section 7, communicate with third parties about matters

relating to an ongoing labor dispute. See, *Sierra Publishing Company d/b/a The Sacramento Union,* 291 NLRB 540 (1988) and cases cited therein, particularly including *Emarco, Inc.*. 284 NLRB 832 (1987) (Chairman Dotson dissenting) and *Cordura Publications Inc.,* 280 NLRB 230 (1986) (Chairman Dotson dissenting) where the employees wrote to the respondent's parent company. The caveat in these cases is that the communication not be so disloyal or maliciously false to remove the employees from the protection of the Act.

The complaints here were not false. Hess agreed that there were problems along the lines complained of and that steps were being taken to correct them. There is no argument that Schillinger had made disloyal or deliberately false statements, or that there was a reasonable fear he would do so when talking to representatives of the State. The totality of the Respondent's argument is that Peat Marwick had a rule making it inappropriate for the Respondent's employees to take their employment concerns to "the client" and since Schillinger would not give sufficient assurance he would not do so, Peat Marwick asked that he be replaced. This resulted in Schillinger's discharge and was violative of the Act.

The Respondent contends the Peat Marwick rule was designed to protect its legitimate interests; thus, even if enforcement of the rule 'might have the ancillary effect of discouraging participation unprotected activities," it is nonetheless lawful, citing *Union Carbide Corp. v. NLRB,* 714 F.2d 657 (6th Cir. 1983). *Union Carbide* is inapposite. There, in dicta, the Court approved the Board's decision that an employer has a basic right to restrict the use of its property. *Union Carbide* does not speak to the matter of an employer

making rules restricting the presentation of grievances, nor was such an issue for decision.

The Respondent further relies on *NLRB v. Truck Drivers, Oil Drivers etc. Local 705,* 630 F.2d 505 (7th Cir. 1980) denying enforcement of a Board order that two of the Union's business agents were unlawfully discharged because they pressed for a wage increase. The employees had first, and inappropriately, asked for the wage increase at a steward's meeting. They knew, and were told, such was not the proper time or place for such a demand, nevertheless, no action was then taken against them for having done so. They were told they would get a wage increase when they deserved one.

The Court did say: 'That employees are protected while presenting wage complaints does not give them carte blanche in choosing the method of presentation, or in their choice of time and place for making those complaints." However, this was not the basis for the denial of enforcement. The Court found that in addition to asking for a wage increase at the steward's meeting, which as long term business agents they knew was an inappropriate forum, they misused the CB radio and passed out flyers at a civic luncheon to the embarrassment of the Union. Further, the executive board had recommended their discharge for poor performance a few months preceding these events, but as with presenting a wage demand at the stewards meeting, they had been given a "second chance." The Court said, 'There must be room in the law for a right of an employer somewhere, some time, at some state, to free itself of continuing, unproductive, internal, and improper harassment." 630 F.2d at 509.

This holding does not mean that an employer can make rules restricting employees from engaging in protected, concerted activity and then require their discharge on the anticipation that the rule might be broken.

Finally, the Respondent argues that in order to be protected by the Act, concerted activity must arise out of a labor dispute, again citing *Jefferson Standard,* and there was no such dispute here within the meaning of Section 2(9) of the Act. I reject this contention. First, neither *Jefferson Standard* nor any other case of which I am aware so hold and second, here there was a controversy between employees and the Respondent concerning some conditions of employment, which would certainly be a matter will within Section 2(9).

IV. REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, conclude that it must be ordered to cease and desist such activity and to take certain affirmative action designed to effectuate the policies of the Act.

Although Schillinger was hired as a temporary employee for the Peat Marwick project only, it is uncertain whether in fact his employment would have ended in November when the project was completed. About one-half of the others so hired continue to work for the Respondent on other projects. Therefore, whether his employment would have ended in November or continued on are equally likely. I do not accept as dispositive Hess's brief and self-serving statement that Schillinger lacked the skills for other jobs. In such matters, typically in the construction industry, the

traditional remedy is ordered, leaving to the compliance stage the issue of whether in fact the individual discriminated against would have been terminated at the completion of the job for which he was hired. *Dean General Contractors,* 285 NLRB 573 (1987) (Chairman Dotson dissenting).

I shall recommend that Laurence Schillinger be offered reinstatement to his former or substantially equivalent position of employment and be made whole for any Joss of earnings and other benefits he may have suffered, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, F.W. - *Woolworth* Co., 90 NLRB 289 (1950). plus interest as computed in New *Horizons for the Retarded.* 283 NLRB 1173 (1987).

On the foregoing findings of fact, conclusions of law and the entire record, I hereby issue the following recommended:[3]

ORDER

The Respondent, Compuware Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging, or otherwise discriminating against, employees because they engage in concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Offer Laurence Schillinger immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority o-r any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the Remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify Schillinger in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Farmington Hills, Michigan, facility

copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.
September 7, 1995

/s/_____
James L. Rose

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[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD-135-95
Detroit, MI

Administrative Law Judge

JD-135-95
Detroit, MI

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, or otherwise discriminate against employees because they engage in concerted activity protected by Section 7 of the Act.

WE WILL offer Laurence Schillinger immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

JD-135-95
Detroit, MI

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 300, 477 Michigan Avenue, Patrick v. McNamara Federal Building, Detroit, Michigan, 48226. Telephone 313-226-2090.

JD-135-95
Detroit, MI

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APPENDIX B

NOTICE: This opinion is subject to formal revision before a publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Compuware Corporation and Laurence Schillinger.
Case 7-CA-36731

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On September 7, 1995, Administrative Law Judge James L. Rose issued the attached decision. The respondent filed exceptions and a brief in support.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the

recommended Order, as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Compuware Corporation, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except the attached notice is substituted for that of the administrative law judge.

Dated, Washington, D.C. December 18, 1995

William B. Gould IV, Chairman

Margaret A. Browning, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

[1] We have modified the notice to employees to conform to language of the recommended Order.

Decision of the NLRB - **Compuware Corporation and Laurence Schillinger**- Case 7-CA-36731

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WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

COMPUWARE CORPORATION

Dennis Boren, Esq., for the General Counsel.
Anthony J. Rusciano of Detroit, Michigan, and *Daniel M.*

Sak, Esq., of Farmington, Hills, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on June 12 and 13, 1995, at Detroit, Michigan, upon the General Counsel's complaint that alleged that on August 22, 1994,[1] the RESPONDENT discharged Laurence Schillinger in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

The Respondent admitted the discharge of Schillinger on August 22, but denied that it had thereby engaged in an violation of the Act. The Respondent affirmatively contends that the activity for which Schillinger was discharged was not concerted or protected by Section 7 of the Act.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Michigan corporation engaged in providing computer software and services to various

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companies, during the course of which business it annually derives gross revenues in excess of $1 million and annually provides services to customers outside the State of Michigan in excess of $50,000. The RESPONDENT admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and 2(7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Fact in Brief*

There is no significant dispute concerning the material facts. KPMG Peat Marwick had a contract with the State of Michigan for an extensive upgrading of the State's computer system. Peat Marwick in turn contracted with the Respondent to furnish support personnel to train State employees on the new system. The RESPONDENT then hired about 38 employees on a temporary basis to work as trainers. (When the Peat Marwick project was completed in November, about one-half of the temporary employees were given other jobs with the Respondent.)

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Schillinger testified that almost from the beginning of his employment he discussed these problems with other employees. And on the morning of August 19, Schillinger had a discussion about these matters with Master Trainer Michael Wilhite (whom the parties stipulated was an employee and not a supervisor within the meaning of Section 2(11) of the Act), at which employees Hugh Kessler and Roger Diamond were present. During this discussion, Schillinger became agitated and told Wilhite that if nothing satisfactory was done, he would express these concerns at a meeting scheduled that afternoon at which there would be representatives of the State as well as Peat Marwick.

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B. *Analysis and Concluding Findings*

During Schillinger's August 19 discussion with Wilhite, Schillinger noted that he was an experienced union steward and that the employees could use his expertise in resolving the employment problems. Wilhite asked if he was trying to organize a union and Schillinger said no. Wilhite did not relay this particular statement of Schillinger's to Hess

or Mutter, although later in the afternoon, without input from Wilhite, Hess asked if Schillinger was there to organize and Wilhite said, "Absolutely not" (using Schillinger's words from the morning). Other than these two statements, there is no evidence that any activity on behalf of any labor organization played a role in the Respondent's decision to terminate Schillinger. I do not believe that Schillinger's statement to Wilhite and Hess's question are sufficient to establish a violation of Section 8(a)(3). Therefore, I conclude that an 8(a)(3) violation has not been proven by a preponderance of the credible evidence and I shall recommend that this allegation of the complaint be dismissed.

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The evidence here establishes that the concerns of employees were being presented to Hess in concert. Schillinger invited Hess to lunch with employees in order to discuss their problems. Hess accepted and heard each employee make a statement. Schillinger opened and closed the discussion.

Employee Hugh Kessler testified that he told Hess privately that he agreed with many of Schillinger's concerns, but he did not agree with Schillinger's approach. Employee Roger Diamond, called as a witness by the Respondent, testified that Schillinger told Wilhite he intended to speak for all employees at the "Heads Up" meeting. Diamond further testified that he had not authorized Schillinger to do so. And

Wilhite testified that five other trainers told him they did not wish to be associated with Schillinger.[2] But, this does not prove that Schillinger did not have the authorization of others or, more importantly, would not have been engaged in the furtherance of concerted action he had attended and spoken at the afternoon meeting.

Notwithstanding evidence that Schillinger did not have the total support of other trainers, I conclude that his activity was concerted within the meaning of the Act. Employees had discussed these matters and following Schillinger talking with Wilhite on the morning of August 19, Hess met with Schillinger and others at noon during which their concerns were discussed.

Clearly the activity of Schillinger comes within the broad definition of "concerted" activity" accepted by the Board in *Meyers Industries*, 281 NLRB 882 (1986)(*Meyers II*) that "encompasses those circumstances where individual employees seek to initiate or induce or to prepare for group action. 281 NLRB at 887. The fact that an employee may act alone during some phase of concerted presentation of employee grievances does not mean he is thereby outside the protection of the Act. See also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964).

Unlike Manimark and other cases cited by the

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[2] This was unobjected to hearsay and is therefore considered for the truth of the fact assertion. *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1554 fn. 15 (D.C. Cir. 1984).

RESPONDENT, the discharge of Schillinger was a preemptive strike. It was unknown to Mutter, and I find of no importance to him, whether Schillinger's intention to speak at the afternoon meeting was to be in aid of concerted activity. Mutter told Hess to remove Schillinger because Schillinger said he would bring up employee grievances at the meeting. Mutter's order had nothing to do with whether Schillinger intended to act alone or in concert. But the RESPONDENT argues that Schillinger was (or would have been) acting alone; therefore, discharging him was not a violation of the Act. I disagree, and conclude that if Schillinger had been allowed to attend the meeting and had he spoken, it is more probable than not that he would have been engaged in concerted activity.

Citing *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), the Respondent argues there are limits to concerted activity which is protected. In *Jefferson Standard*, employees had directed handbills to customers of the TV station which, in essence, suggested that the TV station was not giving its customers good service. For this the employees were discharged. The Respondent analogizes the customers in *Jefferson Standard* with the client of Peat Marwick in this matter. While that analogy may be reasonable, the message to be delivered here is fundamentally different from that in *Jefferson Standard*. The message in *Jefferson Standard* had nothing to do with the wages, hours, or other terms and conditions of employment of the employees. Here Schillinger complained about, and intended to bring up, matters directly relating to the employment of all the trainers–long hours, inadequate preparation time, failure to pay overtime and the like.

The question is whether an employer can make (or as is the case here, acquiesce in) a rule that restricts employees' ability to engage in concerted activity by prohibiting communication with third parties. I conclude not. The Board has repeatedly held that employees may, with the protection of Section 7, communicate with third parties about matters relating to an ongoing labor dispute. See *The Sacramento Union*, 291 NLRB 540 (1988), and cases cited therein, particularly including *Emarco, Inc.*, 284 NLRB 832 (1987) (Chairman Dotson dissenting), and *Cordura Publications Inc.*, 280 NLRB 230 (1986)(Chairman Dotson dissenting), when the employees wrote to the respondent's parent company. The caveat in these cases is that the communication not be so disloyal or maliciously false to remove the employees from the protection of the Act.

The complaints here were not false. Hess agreed that there were problems along the lines complained of and that steps were being taken to correct them. There is no argument that Schillinger had made disloyal or deliberately false statements, or that there was a reasonable fear he would do so when talking to representatives of the State. The totality of the Respondent's argument is that Peat Marwick had a rule making it inappropriate for the RESPONDENT's employees to take their employment concerns to "the client" and since Schillinger would not give sufficient assurance he would not do so, Peat Marwick asked that he be replaced. This resulted in Schillinger's discharge and was violative of the Act.

The Respondent contends the Peat Marwick rule was designed to protect its legitimate interests; thus, even if enforcement of the rule "might have the ancillary effect of

discouraging participation unprotected activities," it is nonetheless lawful, citing *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983). *Union Carbide* is inapposite. There, in dicta, the court approved the Board's decision that an employer has a basic right to restrict the use of its property. Union Carbide does not speak to the matter of an employer making rules restricting the presentation of grievances, nor was such an issue for decision.

The Respondent further relies on *NLRB v. Truck Drivers Local 705*, 630 F.2d 505 (7th Cir. 1980), denying enforcement of a Board order that two of the Union's business agents were unlawfully discharged because they pressed for a wage increase. The employees had first, and inappropriately, asked for the wage increase at a steward's meeting. They knew, and were told, such as not the proper time or place for such a demand, nevertheless, no action was then taken against them for having done so. They were told they would get a wage increase when they deserved one.

The court did say: "That employees are protected while presenting wage complaints does not give them carte blanche in choosing the method of presentation, or in their choice of time and place for making those complaints." However, this was not the basis for the denial of enforcement. The court found that in addition to asking for a wage increase at the steward's meeting, which as long term business agents they knew was an inappropriate forum, they misused the CB radio and passed out flyers at a civic luncheon to the embarrassment of the Union. Further, the executive board had recommended their discharge for poor performance a few months preceding these events, but as with presenting a wage

demand at the stewards meeting, they had been given a "second chance." The court said, "There must be room in the law for a right of an employer somewhere, some time, at some state, to free itself of continuing, unproductive, internal, and improper harassment." 630 F.2d at 509.

This holding does not mean that an employer can make rules restricting employees from engaging in protected, concerted activity and then require their discharge on the anticipation that the rule might be broken.

Finally, the Respondent argues that in order to be protected by the Act, concerted activity must arise out of a labor dispute, again citing *Jefferson Standard*, and there was no such dispute here within the meaning of Section 2(9) of the Act. I reject this contention. First, neither *Jefferson Standard* nor any other case of which I am aware so hold and second, here there was a controversy between employees and the Respondent concerning some conditions of employment, which would certainly be a matter will within Section 2(9).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it must be ordered to cease and desist such activity and to take certain affirmative action designed to effectuate the policies of the Act.

Although Schillinger was hired as a temporary employee for the Peat Marwick project only, it is uncertain whether in fact his employment would have bended in

November when the project was completed. About one-half of the others so hired continue to work for the RESPONDENT on other projects. Therefore, whether his employment would have ended in November or continued on are equally likely. I do not accept as dispositive Hess's brief and self-serving statement that Schillinger lacked the skills for other jobs. In such matters, typically in the construction industry, the traditional remedy is ordered, leaving to the compliance stage the issue of whether in fact the individual discriminated against would have been terminated at the completion of the job for which he was hired. *Dean General Contractors*, 285 NLRB 573 (1987)(Chairman Dotson dissenting).

I shall recommend that Laurence Schillinger be offered reinstatement to his former or substantially equivalent position of employment and be made whole for any loss of earnings and other benefits he may have suffered, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Decision of the NLRB - **Compuware Corporation and Laurence Schillinger**- Case 7-CA-36731

ORDER

The Respondent, Compuware Corporation, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, or otherwise discriminating against, employees because they engage in concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Offer Laurence Schillinger immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the Remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify Schillinger in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the

Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Farmington Hills, Michigan, facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act no specifically found.

Dated, Washington, D.C. September 7, 1995

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, or otherwise discriminate against employees because they engage in concerted activity protected by Section 7 of the Act.

WE WILL offer Laurence Schillinger immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

Re: Compuware Corporation
Case 7-CA-36731

Counsel:

As you know, from December 18, 1995 through January 7, 1996 the National Labor Relations Board was closed due to a lack of appropriated funds. The Board Members, however, were authorized to remain on the job and during this time period they made every effort to continue to decide the cases which were pending before the Board despite the lack of support staff. Accordingly, although cases were decided during this time period, those case could not physically be entered into the Agency's administrative issuance process until the Agency was opened. As you also know, during the week January 8 the NLRB was closed for four days because of the "blizzard of 1996".

As a result, although the date of issuance that is reflected on the decision reflects the date on which the decision actually was finalized by the Board Members, there may be substantial delay between the date the Board decided the case and the mailing of the Board's decision. The Board views the actual mailing date of the decision as the operative date for the filing of any motions for reconsideration with the Board and/or for the filing of any petitions for review. See Section 102.48(d) (2) of the Board's Rules and Regulations.

Very truly yours,

/s/_____
John J. Toner
Executive Secretary

Mailing date of decision January 22, 1996

APPENDIX C

NOT INCLUDED IN BOUND VOLUMES

GBF
Detroit, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMPUWARE CORPORATION

and

LAURENCE SCHILLINGER
an Individual

Case 7-CA-36731

ORDER DENYING MOTION

On December 18, 1995, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding, affirming the administrative law judge's finding that the Respondent discharged Charging Party Schillinger in violation of Section 8(a) (1) of the Act, and adopting the judge's recommended order directing, in part, that the

Respondent offer Schillinger reinstatement.[1] On February 16, 1996, the Respondent filed a Motion for Reconsideration with the Board, alleging, among other things, that the Board erred in failing to provide reasons for its decision, in finding that the Respondent violated the Act, and in ordering reinstatement as a remedy.

The Board, by a three-member panel, has considered the motion in light of the record and has decided to deny the motion as lacking in merit for the reasons set forth below.

First, the Respondent assails what it characterizes as the Board's summary affirmation of the judge's decision and failure to provide reasons therefor. The Board's decision, however, expressly "affirm[s] the judge's rulings, findings, and conclusions," thereby adopting his findings of fact, legal analyses, and conclusions of law as its own. Reviewing a similar challenge to a decision of the Board, the U.S. Court of Appeals for the D.C. Circuit stated:

> It is clear, both from our experience and as a matter of principle, that this practice [of affirming and adopting wholesale the reasoning of the administrative law judge without further elaboration] is acceptable as a general matter, for it ordinarily provides (albeit in a manner that is relatively effortless for the Board) sufficient explanation of the basis of the decision both to the parties and to reviewing courts[2]

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[1] 320 NLRB No. 18.

[2] UFCW v. NLRB (Dubuque Packing Co.), 880 F.2d 1422, 1436 (D.C. Cir. 1989).

Next, the Respondent asserts that the judge erroneously decided certain issues and arguments that it reiterated in its exceptions and now in its reconsideration motion, and that the judge failed to address certain other contentions.[3] More specifically, the Respondent argues that: (1) Schillinger was not engaged in concerted activity because he did not have the authorization of other employees, and that the judge misallocated the burden of proof in this regard; (2) the judge erred in finding that the Respondent violated the Act by acquiescing in Peat Marwick's request to remove Schillinger; (3) the judge erred in concluding that an employer may not adopt a rule prohibiting employees-from complaining to its customers about working conditions; (4) the judge erred in concluding that Schillinger's threat was not an act of disloyalty; (5) the Respondent had no knowledge that Schillinger was engaged in alleged protected, concerted activity; (6) the activity was not protected because it did not relate to an "ongoing labor dispute"; and (7) the record does not justify the reinstatement remedy.

Having reviewed the Respondent's motion in light of the Board's Decision affirming the judge's rulings, findings and conclusions, we find that the motion fails to raise any issue not previously considered, and otherwise lacks merit.

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[3] The Respondent's brief in support of exceptions to the judge's decision is attached to the motion and incorporated by reference therein as "the factual and legal support" for reconsideration.

NLRB Order Denying Motion

ORDER

The motion for reconsideration filed by the Respondent, Compuware Corporation, is denied as lacking in merit.

Dated, Washington, D.C. , August 27, 1996.

William B. Gould IV, Chairman

Margaret A. Browning, Member

Sarah M. Fox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1998 FED App. 0033P
(6th Cir.)
File Name: 98a0033p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 96-6625/6338

COMPUWARE CORPORATION,
Petitioner/ Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/ Cross-Petitioner.

On Petition for Review and Cross-Application
for Enforcement of an Order of the National Labor
Relations Board.
No. 7-CA-36731

Argued: October 20, 1997

Decided and Filed: January 28, 1998

Compuware Corp. v. NLRB
Nos. 96-6225/6338

Before: MERRITT, MOORE, and BRIGHT****,
Circuit Judges.

COUNSEL

ARGUED: Ernest R. Bazzana, PLUNKETT & COONEY, Detroit, Michigan, for Petitioner. Deborah E. Shrager, NATIONAL LABOR RELATIONS BOARD, APPELLATE COURT BRANCH, Washington, D.C., for Respondent. ON BRIEF: Ernest R. Bazzana, PLUNKETT & COONEY, Detroit, Michigan, for Petitioner. Deborah E. Shrager, Aileen A. Armstrong, Linda Dreeben, NATIONAL LABOR RELATIONS BOARD, APPELLATE COURT BRANCH, Washington, D.C., for Respondent.

OPINION

BRIGHT, Circuit Judge. Compuware Corporation ("Compuware') discharges employee Laurence Schillinger ("Schillinger") at the request of Compuware's client, KPMG Peat Marwick ("Peat Marwick"), because Schillinger threatened to complain about Compuware's employment practices to the State of Michigan ("the State"). Peat Marwick had obtained a contract from the State to upgrade the State's computer system. The discharge led to an unfair labor practice charge against Compuware under section 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. § 158

**** The Honorable Myron H. Bright, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

(a)(1) and (3)) ("the Act"). Following an administrative hearing, the administrative law judge ("ALJ") found Compuware had discharged Schillinger in violation of section 8(a)(1) of the Act and recommended that Compuware offer Schillinger reinstatement and back pay. The Board affirmed the ALJ's ruling, *Compuware Corp. and Laurence Schillinger*, 320 NLRB 101 (1995), and thereafter rejected Compuware's motion for reconsideration, Case 7-CA-3673 I, order dated August 27, 1996. In essence, the Board's decision determined that Schillinger had engaged in protected concerted activity in raising employee concerns with the employer and that his threat to raise those concerns with the State of Michigan did not justify the discharge.

Compuware filed a petition for review and the National Labor Relations Board cross-applied for enforcement of the Board's order. We reject Compuware's petition for review and enforce the Board's order. Our review of the record as a whole demonstrates that the Board's order is supported by substantial evidence.

I. BACKGROUND

The State awarded Peat Marwick, an accounting firm, a contract to upgrade the State's computer system. Peat Marwick then contracted with Compuware, headquartered in Farmington Hills, Michigan, to furnish support personnel to train the State's employees on the new computer system. The training took place in the Knapp Building in Lansing, Michigan, some distance from Compuware's headquarters.

Laurence Schillinger, the charging party, began

working in a temporary trainer position for Compuware in early July 1994. Schillinger discussed work-related problems with other employees from the very beginning of his employment. On August 22, 1994, Compuware terminated Schillinger from the State project at the direction of Peat Marwick. Peat Marwick decided to remove Schillinger because Schillinger had threatened on August 19, 1994 to approach the State with work-related concerns, in violation of a Peat Marwick work rule. Tr. at 147-49, 273-78.[1]

Compuware, in its petition for review, contends that the ALJ's decision adopted by the Board is incorrect as a matter of law and fact. Although Compuware raises several issues in this appeal,[2] we will focus primarily on the issue

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[1] "Tr." refers to the transcript of the proceeding before the ALJ on June 12, 1995 and June 13, 1995 which is set forth in a single volume paginated consecutively.

[2] In its petition for review, Compuware raised the following issues: (1) whether the ALJ erred in finding that Schillinger had engaged in concerted activity; (2) whether the ALJ erred when he failed to address the issue of employer knowledge as an element required to be proven by the Board; (3) whether the ALJ erred in his conclusion that Peat Marrick was not entitled to promulgate a work rule which prohibits employee communication of work-related concerns with Peat Marwick's client; (4) whether the ALJ erred when he failed to balance Peat Marwick's work rule against any incidental effect on employee rights under the Act; (5) whether the ALJ erred in finding that an ongoing labor dispute is not required to justify employees approaching third parties with work-related complaints, and in finding that an ongoing labor dispute was present in this case; (6) whether the ALJ erred in

orally argued by Compuware, which is whether substantial evidence supports the Board's finding that Schillinger engaged in concerted activity, rather than merely his own concerns. We will discuss briefly Compuware's other issues.

II. DISCUSSION

Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] .... "29 U.S.C. § 158(a)(1). Section 7 of the Act guarantees employees the right to engage in "concerted activities" not only for self-organization, but also "for the purpose of...mutual aid or protection "29 U.S.C. § 157. The broad protection of section 7 includes protecting unorganized employees who need to speak for themselves as best they can. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

The Board's determination that an employee engaged protected concerted activity is entitled to great deference.[3]

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failing to address the issue of whether Schillinger's discharge was motivated by or substantially based upon his participation in alleged protected activity; (7) whether the ALJ erred in holding Compuware responsible for the actions of Peat Marwick; and (8) whether the remedy ordered by the ALJ was inappropriate, does not effectuate the purposes of the Act and is not justified by the. record. The Board adopted as its own with minor modifications the decision by the ALJ, including rulings, findings, and conclusions.

[3] In *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115 (6th Cir. 1997), we articulated that the standard of review under

Dayton Typographic Serv., Inc. v. NLRB, 778 F.2d 1188, 1191 (6th Cir. 1985). The Board's findings are entitled to affirmance if supported by substantial evidence in the record as a whole, and we may not reverse such a finding even if this panel "would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

A. Concerted Activity

Compuware argues that Schillinger's actions fall outside the protection of section 7 because his activity was not concerted. Compuware contends that although Schillinger's concerns may have been shared by other coworkers, no evidence indicates that any coworker authorized Schillinger to represent them. Compuware argues that without such authorization, Schillinger's actions would not constitute concerted activity.

Specific authorization is not needed to show "concerted activity." *See NLRB v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 445 (6th Cir. 1981) ("It is not necessary that

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Holly Farms is that if Congress has not spoken on an issue, the Board is entitled to deference so long as its interpretation of the Act is a reasonable one. *Id.* at 1119 (citing *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396 (1996)). This standard of review accords with Sixth Circuit precedent giving deference to legal determinations of the Board. *See Emery Realty, Inc. v. NLRB*, 863 F. 2d 1259, 1262 (6th Cir. 1988); *General Truck Drivers, Chauffeurs, Warehousemen and Helpers of Am., Local No. 957 v. NLRB*, 934 F.2d 732, 735 (6th Cir. 1991).

the individual employee be appointed or nominated by other employees to represent their interests."); *Dayton Typographic Serv.*, 778 F.2d at 1191; *NLRB v. Guernsey-Muskingum Elec. Coop., Inc.*, 285 F.2d 8, 12 (6th Cir. 1960). Rather, conduct of an individual employee may be considered "concerted activity" if the employee's actions are "made on behalf of other employees or at least . . . made with the object of inducing or preparing for group action . .", *ARO, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979). Activity is concerted "if it is related to group action for the mutual aid or protection of other employees." *Lloyd Fry Roofing*, 651 F.2d at 445. Therefore, the relevant question is whether the employee acted with the purpose of furthering group goals.

Comparing this case to *Manimark Corp. v. NLRB*,[4] 7 F.3d 547, 550 (6th Cir. 1993), Compuware argues that the Board did not show Schillinger was acting for the group. The following findings of fact made by the ALJ and adopted by

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[4] In *Manimark*, this court held that employee Hurley Fields had not engaged in protected concerted activity because there was no "evidence that Fields was acting in anyone's interest but his own . . ." *Manimark*, 7 F.3d at 551. This court noted that Fields brought up group complaints as an afterthought to a conversation concerning his commissions. This court further emphasized that "Fields' refusal to follow up on the problems by arranging a group meeting weakens his argument that he was acting on behalf of other drivers." *Id.* This court did not simply look at the group nature of the complaint. Rather, this court looked at other evidence to indicate if coworkers had decided to act upon their complaints. This court did not find evidence to indicate Fields' coworkers wanted to pursue any action.

the Board belie this argument:

> Schillinger testified that almost from the beginning of his employment he discussed these problems with other employees. And on the morning of August 19, Schillinger had a discussion about these matters with Master Trainer Michael Wilhite (whom the parties stipulated was an employee and not a supervisor within the meaning of Section 2(11) of the Act), at which employees Hugh Kessler and Roger Diamond [sic][5] were present. During this discussion, Schillinger became agitated and told Wilhite that if nothing satisfactory was done, he would express these concerns at a meeting scheduled that afternoon at which there would be representatives of the State as well as Peat Marwick [sic].
>
> Wilhite told Schillinger that it would be improper for him to bring up these problems at the meeting with State representatives, to which, Wilhite testified, Schillinger said, "We'll see." Wilhite called John Hess, [Compuware's] account manager for this project to report Schillinger's intent. Hess was not available and Willhite left a voice mail message; but he also called James Michael Mutter, who at the time was the Peat Marwich [sic] on site team leader for the project.
>
> Mutter was concerned that Schillinger would in fact

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[5] The correct spelling of Roger Diamond's last name is Dymond.

raise these issues with the client, and absent assurance he would not, Mutter wanted him taken off the project. Mutter and Hess testified that Peat Marwick retained the right to require [Compuware] to withdraw any employee from the project.

Hess returned Wilhite's call, learned of the situation and came to the project. He talked with Schillinger and Wilhite and at Schillinger's invitation, joined several trainers for lunch to talk about various work related problems. Shortly thereafter, Hess talked to Mutter, who stated he was so concerned that Schillinger might bypass the chain of command that he was considering canceling the meeting. Mutter asked if Hess could give him assurances that Schillinger would not bring up these problems at the meeting, and when Hess could not, Mutter said he would have to find out what to do. It appears, however, though somewhat unclear, that Mutter first told Hess that Schillinger should not go to the meeting and told him to give Schillinger the rest of the day off. Then Mutter checked with his superiors and they concluded that Schillinger should be replaced, and this order came later.

Saturday Hess called Schillinger and asked him to report to Hess's office on Monday, August 22. Schillinger did so and was informed by Hess that he was being terminated from the project at the direction of Peat Marwick. Since Schillinger was a temporary employee for that particular project, and, according to Hess, deemed insufficiently skilled for other jobs, he

was terminated from employment with [Compuware].

Compuware Corp. and Laurence Schillinger, 320 NLRB 101, 102 (1995).

Two coworkers testified that they had not authorized Schillinger to represent their concerns to management. However, the Board's finding that Schillinger's proposed action would have been concerted is not undermined by the fact no employee specifically endorsed Schillinger's proposal to raise employees' grievances to State representatives. *See NLRB v. Parr Lance Ambulance Serv.*, 723 F.2d 575, 579 (7th Cir. 1983). Therefore, the testimony, of Schillinger's two coworkers is not necessarily determinative of the issue whether Schillinger was acting on behalf of the group interests or for his own self-interest.

Our review of other evidence from the hearing demonstrates concerted activity. We note that from the beginning of his employment, Schillinger had discussed work-related concerns with many of the thirty other trainers. Furthermore, we consider the evidence of the exchange between Schillinger and the employees on August 19 to be revealing. Roger Dymond testified that during Schillinger's argument with Wilhite on the morning of August 19, 1994, Schillinger said "he was going to speak for ALJ of us that afternoon [at the meeting] . . ." Tr. at 304. In addition, Schillinger showed that he was acting on behalf of the group by facilitating a lunch discussion between managers and trainers on August 19. The employees demonstrated sharing Schillinger's interest in obtaining resolution of their grievances by attending the lunch meeting at his request.

Moreover, Schillinger made it known to management and his coworkers that he had organized a labor union at a previous job and received a degree in labor relations. In fact, some of the other trainers had previously commented that because Schillinger, who had been a unions steward at a former job, "knows this stuff, he should talk to the management people." Tr. at 183.

After reviewing the entire record, we conclude that the evidence regarding the morning discussion and lunch indicates that if Schillinger had attended the afternoon meeting with the State and Peat Marwick representatives, he would have restated the concerns of the trainers as a group. The evidence demonstrates that Schillinger expressed group concerns to his coworkers and management. The lunch attended by Wilhite, manager Hess and Schillinger demonstrates Schillinger's interest and effort on behalf of the group, which constitutes concerted activity. Thus, unlike the employee in *Manimark,* Schillinger acted on behalf of the group and not simply on his own behalf.

B. Peat Marwick Work Rule

Compuware contends that Peat Marwick's work rule prohibiting employees from complaining to its clients regarding working conditions was valid under section 7 of the Act. Compuware argues work rules are allowed when the rule is designed to protect legitimate employer interests even where there may exist an ancillary effect of discouraging participation in protected activities. *Union Carbide Corp. v.* NLRB, 714 F.2d 657, 664 n.3 (6th Cir. 1983). However, this work rule on its face does not appear to strike any sort of

balance between employee fights and the legitimate concerns of Peat Marwick. An employer may not enforce a rule that improperly interferes with its employees' statutory right to engage in concerted activity. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-804 (1945). We affirm the Board's ruling that Peat Marwick cannot institute a work rule that restricts employees' ability to engage in concerted activity by prohibiting communication with third parties.

C. Ongoing Labor Dispute

Compuware argues that the Board erred in stating an ongoing labor dispute was not required to be protected concerted activity when that activity was going to third parties with work-related complaints. Compuware also contends the Board erred in finding that an ongoing labor dispute was present in this case. Compuware contends that no ongoing labor dispute was present because management was on the same side as the workers and was addressing the work-related problems. The Supreme Court held that a labor dispute can still exist when management begins to address employees' complaints about their working conditions. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). The Supreme Court noted that the conduct may at that point be "unnecessary and unwise" but the reasonableness of the decision to engage in concerted activity is simply "irrelevant to whether a labor dispute exists or not." *Id.* at 16. Substantial evidence supports the Board's findings that Schillinger and other employees were involved in a dispute over conditions of employment. Therefore, we reject Compuware's argument that no labor dispute existed.

D. Disloyalty to Employer

Compuware also argues that Schillinger's actions if concerted were not protected but instead were acts of disloyalty to the employer. This argument is also rejected. Employees have the right to engage in concerted communications with third parties regarding legitimate employee concerns, such as terms and conditions of employment and grievances. *Sierra Publishing Co. v. NLRB,* 889 F.2d 210, 216-17 (9th Cir. 1989). An employee's appeal to a third party or in this case a client only loses its protected status if the appeal does not relate to the labor practices of the employer or are maliciously false. *Handicaps, Inc. and Ronald F. Trail,* 318 NLRB 890, 896 (1995), enforced, 95 F.3d 681,684-85 (8th Cir. 1996). If Schillinger had discussed work-related concerns with the State, the discussions, while violating Peat Marwick's work rule, would not have lost their protected status.

We agree with the Board's opinion and analysis on this issue:

> The question is whether an employer can make (or as is the case here, acquiesce in) a rule that restricts employees' ability to engage In concerted activity by prohibiting communication with third parties. I conclude not. The Board has repeatedly held that employees may, with the protection of Section 7, communicate with third parties about matters relating to an ongoing labor dispute. *See The Sacramento Union,* 291 NLRB 540 (1988), and cases cited therein, particularly including *Emarco, Inc.*, 284 NLRB 832

> (1987) (Chairman Dotson dissenting), and *Cordura Publications Inc.*, 280 NLRB 230 (1986) (Chairman Dotson dissenting), when the employees wrote to the respondent's parent company. The caveat in these cases is that the communication not be so disloyal or maliciously false to remove the employees from the protection of the Act.
>
> The complaints here were not false. Hess agreed that there were problems along the lines complained of and that steps were being taken to correct them. There is no argument that Schillinger had made disloyal or deliberately false statements, or that there was a reasonable fear he would do so when talking to representatives of the State. The totality of [Compuware's] argument is that Peat Marwick had a rule making it inappropriate for [Compuware's] employees to take their employment concerns to "the client" and since Schillinger would not give sufficient assurance he would not do so, Peat Marwick asked that he be replaced. This resulted in Schillinger's discharge and was violative of the Act.

Compuware Corp. and Laurence Schillinger, 320 NLRB 101, 103 (1995).

E. Responsibility of Peat Marwick for the Discharge

Compuware argues the Board erred by holding Compuware responsible for Schillinger's discharge when the discharge was requested by its client Peat Marwick. However, Compuware was not unaware of why Peat Marwick wanted

Schillinger to be discharged. In fact, Compuware knew the basis of the removal was to prevent Schillinger from communicating with its client, the State, about employee grievances. In addition, a private agreement that violates statutory labor provisions is unenforceable. *See Clinch Valley Clinic Hosp. v. NLRB*, 516 F.2d 996, 998-99 (4th Cir. 1975). We therefore reject this argument against enforcement of the decision.

F. Remedy

Compuware argues that the remedy ordered by the Board is inappropriate and not justified by the record. Compuware contends it is unlikely Schillinger would have been retained after the project because only one half of the temporary employees from the project continued to be employed and Schillinger was less qualified than most of the employees. The standard of review of a remedial order is abuse of discretion. *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 903 (6th Cir. 1996). At this stage, the Board's decision that Schillinger should be reinstated is not an abuse of discretion as it is the normal remedy in an unlawful discharge case. *See Dean General Contractors*, 285 NLRB 573, 573 (1987). However, at the compliance stage of the order, Compuware can further raise the issue of whether Schillinger would have been terminated at the end of the project.

III. CONCLUSION

For the foregoing reasons, enforcement of the decision and order of the Board is GRANTED.

APPENDIX E

96-6225/6338

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

MARCH 13, 1998

LEONARD GREEN, Clerk

COMPUWARE CORPORATION,

Petitioner/Cross-Respondent,

V.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ORDER

BEFORE: MERRITT, MOORE, and BRIGHT,[******] Circuit Judges.

[******] Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to ALJ other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en bane, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission anti decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk,